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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**

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8 UNITED STATES OF AMERICA,)

9 Plaintiff,)

10 vs.)

11 PAUL KLEIN,)

12 Defendant.)
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2:04-cr-0208-RLH-PAL

ORDER
(Motion Under § 2255-#93)

14 Before the Court is Defendant Klein's Motion Under 28 U.S.C. § 2255 to Vacate, Set
15 Aside, or Correct Sentence by a Person in Federal Custody (#93, filed September 29, 2008). The
16 Government filed its Opposition (#97) on November 6, 2008, and the matter was submitted for
17 decision. The Motion will be denied.

18 **FACTS**

19 Following a plea of guilty, on December 19, 2005, this Court sentenced Defendant to
20 two concurrent terms of 70 months' imprisonment for (1) Count One, "Possession of Machine
21 Guns," and (2) Count Four, "Felon in Possession of a Firearm."

22 On April 20, 2007, the Ninth Circuit Court of Appeals issued a memorandum
23 opinion affirming the Judgment and sentence. On May 14, 2007, the Ninth Circuit entered its
24 Judgment affirming the judgment and sentence.

25 Defendant petitioned the Supreme Court for certiorari, which was denied on October
26 9, 2007. This Motion follows.

1 (quoting *Strickland*, 466, U.S. at 690).

2 In addition to demonstrating unreasonableness, the Defendant must also establish
 3 prejudice by showing that there is ““a reasonable probability that, but for counsel’s unprofessional
 4 errors, the result of the proceeding would have been different.”” *Quintero-Barraza*, 78 F.3d at 1348
 5 (quoting *Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to
 6 undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. A court “ need not determine
 7 whether counsel’s performance was deficient . . . [i]f it is easier to dispose of an ineffectiveness
 8 claim on the ground of lack of sufficient prejudice.” *Id.* At 697.

9 DISCUSSION

10 I. PROCEDURAL DEFAULT

11 Defendant Klein failed to raise on direct appeal either his “Double Jeopardy” or his
 12 “Speedy Trial” arguments. Where a defendant does not include a particular issue on direct appeal,
 13 that issue is deemed “defaulted” and cannot—absent unusual circumstances—be raised under Section
 14 2255. *See, Massaro v. United States*, 538 U.S. 500, 504 (2003) (“[T]he general rule [is] that claims
 15 not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause
 16 and prejudice”). Citing *United States v. Frady*, 456 U.S. 152 (1982), Justice Scalia has explained:

17 [A] prior opportunity for full and fair litigation is normally dispositive
 18 of a federal prisoner habeas claim. If the claim was . . . not raised [on
 19 direct appeal], it is procedurally defaulted and the habeas court will
 not adjudicate it absent countervailing equitable considerations (*e.g.*,
 actual innocence or cause and prejudice. . .).

20 *Withrow v. Williams*, 507 U.S. 720-721 (1993) (Scalia, J., concurring).

21 Defendants who fail to raise an issue on direct appeal may later challenge the issue
 22 under Section 2255 only if they demonstrate: (1) sufficient “cause” for the default; and (2) “preju-
 23 dice” resulting from it. *See Bousley v. United States*, 523 U.S. 614, 622 (1998). Klein has not
 24 established “cause” for his default, and non appears in the record. To the contrary, Klein’s “Double
 25 Jeopardy” and “Speedy Trial arguments were available in 2005, if they exist at all, and they could
 26 have been raised on direct appeal. He failed to do so, and he cannot do so now. He cannot get two

1 bites of the appeal apple. He provides no reason that the issues could not have been raised on
2 appeal. He does not argue actual innocence, nor does he explain how he was prejudiced other than
3 his plea of guilty, which was made voluntarily.

4 II. DOUBLE JEOPARDY

5 Defendant Klein's claim for double jeopardy is without basis and completely
6 misrepresents the facts. Klein claims that the weapons in question were discovered during a search
7 incident to a condition of his supervised release on a case before the Honorable Kent J. Dawson, or
8 during a search pursuant to a warrant following the discovery by the probation officer. He further
9 argues that he was found not guilty of the weapons charges at the hearing on the petition charging
10 him with violations of his supervised release. Because the charges in this case involve those same
11 firearms, the charges in this case, he alleges, amount to double jeopardy because he was previously
12 found not guilty of those same charges before Judge Dawson.

13 His claim is false and without a factual basis. He was charged with violation of the
14 conditions of release and the petition did include the possession of the firearms in question.
15 However, prior to the resolution of the violation petition, he was indicted in this case on the firearms
16 charges. Therefore, at the hearing on the violation of supervised release, pursuant to an agreed
17 resolution, he admitted to another violation of supervised release and the charges relating to the
18 firearms were not pursued since they were the subject of an indictment. Klein, himself, acknowl-
19 edges this when he states that as to the violation he admitted to, he was given credit for time served.

20 There was NO finding of not guilty of the firearms charges by Judge Dawson, nor
21 any acquittal, at the hearing on the violations of supervised release. In fact there was no finding
22 whatsoever on those charges. That hearing occurred five days after the indictment in this case was
23 filed. No jeopardy attached. Furthermore, the subject of the hearing before Judge Dawson was
24 whether he violated the conditions of his release, not whether he was guilty of possession of a
25 machine gun in violation of 18 U.S.C. § 922(o)(1), or whether he was guilty of being a felon in
26 possession in violation of 18 U.S.C. § 922(g)(1). The violations of release and the statutory

1 possession violations are for different offenses and require different elements of proof and different
2 standards of proof. Thus Klein's claim of double jeopardy is without merit and his attorney's failure
3 to raise the issue does not constitute ineffective assistance of counsel. Counsel was effective in
4 insuring that Klein avoided the potential enhancement of the sentence in this case by avoiding a
5 finding of a violation on those elements of the violation petition before Judge Dawson.

6 III. SPEEDY TRIAL VIOLATIONS

7 Defendant Klein's arguments about violations of his Speedy Trial rights are also
8 disingenuous. The record of this case shows that every delay in the trial was at the request of
9 Defendant. They are based upon, among other things, the fact that the Defendant had hearings in
10 California, or that his attorney had hearings in California, or that his attorney had filed a motion for
11 suppression, etc. The only continuance obtained by the Government was for an extension of a week
12 to respond to one of Defendant's motions, and that continuance did not affect the trial date.

13 Defendant continued his delaying tactics by repeatedly continuing his change of plea.
14 Every stipulated continuance was supported by good and sufficient reasons and necessitated by the
15 needs of Defendant and/or his counsel. Throughout this period, Klein was released on bond, and at
16 one point even asked permission to travel outside the District of Nevada, which was granted.
17 Furthermore, none of the delays were long, certainly no longer than that requested by Defendant.
18 There is no showing of prejudice to Defendant. In fact, he is the one who requested and benefitted
19 from the delays.

20 In evaluating possible violations of the Speedy Trial Act, the Court considers (1)
21 whether the delay was uncommonly long, (2) whether government or defendant is more to blame for
22 delay, (3) whether defendant asserted right to a speedy trial, and (4) whether defendant suffered
23 prejudice as a result of delay. *See Doggett v. United states*, 505 U.S. 647, 651 (1992); *see, also*,
24 *United States v. Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986). Defendant meets none of these
25 criteria.

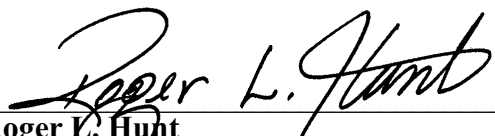
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1 Accordingly, Klein's allegations of violation of the Speedy Trial Act are without
2 merit and counsel's failure to raise this issue does not demonstrate ineffective assistance of counsel.
3 In fact, several of the delays in the change of plea involved his counsel negotiating for more
4 favorable plea agreement provisions and demonstrate counsel's effectiveness and pursuit of
5 Defendant's interests and rights.

6 For all the reasons stated above, Defendant Klein's Motion is without merit.

7 IT IS THEREFORE ORDERED that Defendant Klein's Motion Under 28 U.S.C. §
8 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (#93) is DENIED.

9 Dated: November 25, 2008.

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13 Roger L. Hunt
14 Chief United States District Judge
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